3 days. The learned Chief Justice held that this was a breach of their agreement within Section 53 (iv) (a) of the Labour Code.

The application was argued persuasively and at length by Mr. John Eber, who said that the matter was one of public importance. Rights of appeal are purely creatures of statute and this Court cannot entertain any which cannot be brought strictly within the statutory limits. Mr. Eber sought to come within Section 17 (a) Cap. 2 on the ground that there were two errors of law in the Chief Justice's judgment: That Section 53 (iv) (a) of the Labour Code must be read in the light of sub-section (iii) and regard must be had to the days worked in the month, so that it is wrong in law to say that absence for any three days is a breach within the former provision; Secondly, that under Section 39 Cap. 52 the contract of service would, on the breach, be voidable only and the employer had not specifically avoided it.

I do not think there is anything in either of these points nor that Mr. Eber had any great faith in them, putting them forward by way of compliance with the section when the cause of complaint was elsewhere. It is true Section 53 (iii) of the Labour Code speaks only of some duties of the employer, but this does not mean the labourer has none. The agreement is one of service, which implies a duty and readiness to service at any usual lawful hours during the period of service. Nor does a provision for a minimum wage and giving the employer an implied choice of working days, give the employee a choice of idle days. The examples to Section 39 of the Contract Enactment are clear enough, the continuance or renewal of the contract depends on the assent of the promisee, not its avoidance on any specific notice.

The refusal to reinstate after the strike seems to have been pleaded, possibly in error, as the breach of contract by the employer. The Deputy Commissioner of Labour discussed at length what he calls the legality of strikes, and relied on an English Statute then repealed. The wording is perhaps unfortunate as suggestive of some criminality. A strike is merely a fact, the co-ordinated withdrawal by workmen of their labour, and may or may not be a breach of contract. Strike notices are probably sufficient in most cases to terminate the contracts of most men engaged, and in such case there is no breach of contract. The withdrawal may be without due notice and a breach of contract. In either case the contract of service is ended, that being the very purpose of the strike; the only question that remains is one of reinstatement or a new contract.

The true cause of complaint here seems to be that there was a prior breach of contract by the employer in reducing wages. This point seems never to have been taken before the Chief justice, and it is impossible to say there is an error in the law when the point was not taken to which that law was to be applied. It was not stressed before the Deputy Commissioner of Labour, but we are not sitting on his judgment; our jurisdiction is to be found in Section 16 Cap. 2. It is true the Chief Justice says the strike was "in protest against a cut which had been made generally in the wages of rubber tappers." This only makes it clear he knew of the fact, but it was not put before him as the breach of contract. It may not, however, be superfluous to add that what is called a "cut" was in fact an offer by the employer of a new or amended contract. That offer may have constituted a breach of the subsisting contract, or may have been evidence of an intention not to abide thereby. This point has not been developed nor proved. It is, however, manifest that a strike is not necessarily an affirmation of the old contract, nor a claim for damages for its breach, and it most certainly is not an acceptance of the new offer. The only deduction which could be drawn was that any contract between the parties was, when reinstatement was sought, at an end: subject to any claims arising out of any proved breach of contract.

This is not a case in which the Court can grant leave to appeal, and such leave is refused.

Leave to Appeal Refused.

CHOI WAI v. KWAN SIEW FONG.

[Orig. Civil Juris. (Callow, J.) March 31, 1948]
[Seremban — O.M. No. 19 of 1947]

Order of Certiorari — Procedure — Jurisdiction of Rent Assessment Board — Meaning of "landlord" — Rent and Charged Land (Restriction) Enactment — Control of Rent Ordinance, 1948.

This was an application for an Order of Certiorari to remove to the Supreme Court and quash an order of the Seremban Town Rent Assessment Board on the grounds that the Order was "an abuse of its jurisdiction improperly exercised". No application had been made for a review of the order.

Held, (1) that as the applicant had not first sought the remedy of review and further had been guilty of laches, the Court was unable to exercise its discretion in issuing the Order of Certiorari; (2) that even assuming that the applicant had taken the preliminary steps

in sufficient time, it had not been shown that the Rent Assessment Board had improperly exercised jurisdiction in the matter and therefore the application for the Order of Certiorari must be refused.

Cases referred to:—

(1) *Ex parte Yeo Poh Neo* (1946) M.L.J. 59.
(2) *Alkaff & Co. v. The Governor in Council* (1937) M.L.J. 215.
(3) *R. v. Surrey Justices* (1870) L.R. 5 Q.B. 466.
(4) *R. v. Staffordshire Justices* (1940) 2 K.B. 33.
(5) *Ramasamy v. Teung Tze Meng & another* (1946) M.L.J. 13.
(6) *R. v. Electricity Commissioners* (1924) 1 K.B. 204.
(7) *R. v. Commissioners of Income Tax for the City of London* 91 Law Times 94.
(8) *R. v. Grant and others* 117 E.R. 25.
(9) *Meyappa Chetty v. Supramaniam Chetty* (1916) 1 A.C. 669.
(10) *P. V. Athimoolam Chettiar v. S. A. Athamsah & Co.* (1946) M.L.J. 145.

ORIGINATING MOTION.

R. Ramani for the Applicant.

R. V. Rintoul for the Respondent.

Callow, J. : — This is an application for an Order of Certiorari to remove to this Court and quash an Order of the Seremban Town Rent Assessment Board dated the 27th day of September, 1946, made in application No. 9 of 1946, on the grounds that the Order was "an abuse of its jurisdiction improperly exercised".

The facts are that in October, 1942, during the Japanese occupation, the late Kwan Lan Su let to Choi Wai (the applicant in these proceedings and the respondent before the Rent Assessment Board) the ground floor of premises situate at 39 Birch Road, which is the main street of Seremban. The relevant document is marked C.W.1.

On the 26th of January, 1945, Kwan Lan Su died, and his son Kwan Siew Fong (the respondent in these proceedings and the applicant before the Rent Assessment Board) became executor. The will, a copy of which is attached to the affidavit to this motion, leaves the property to the testator's wife and children; the respondent Kwan Siew Fong heads the list.

After the re-occupation negotiations were opened with the applicant to vacate the premises, and there is mention of alternative accommodation. However these negotiations evidently proved abortive, for proceedings were instituted before the Rent Assessment Board which on the 27th of September, 1946, granted leave to the respondent to seek an ejectment order against the applicant on or after the 1st of January, 1947.

On the 16th of May, 1947, the respondent filed his plaint for ejectment; and the applicant on the 12th of July, 1947, proceeded by the originating motion now before the Court. I do not know the reason for the delay in hearing from July to March but I understand it does not lie with the Court.

The first consideration is the procedure whereby the order is sought and the power to make it. The procedure is different from English practice, but with an exception to which I shall refer later, appears to follow that in *Ex parte Yeo Poh Neo*[1]. Learned Counsel for the applicant cited also *Alkaff & Co. v. The Governor in Council*[2]. This follows *R. v. Surrey Justices*[3] explained in *R. v. Staffordshire Justices*[4]. The rule of law is that certiorari lies unless expressly taken away, and I am satisfied that the necessary power is vested in this Court to entertain the application made.

Now the writ of certiorari is a process by which this Court, in the exercise of its superintending power over inferior jurisdiction, may examine the legality of proceedings in such tribunals, *Short and Mellor* p. 14.

But the order for the issue of a writ of certiorari is strictly in all cases a matter of discretion. If no special circumstances exist, and if all that appears is a clear excess of jurisdiction, the person aggrieved is entitled *ex debito justitiae* to the order; which merely means that the Court *will* exercise its discretion by granting the relief. Where it is established that the Court is entitled to inquire into the circumstances of the case, and the conduct of the applicant, the case must be one of discretion, *R. v. Staffordshire Justices*[4].

I have alluded to a difference in these proceedings with those in the case of *Yeo Poh Neo* (cited *supra*). In that case the applicant, before seeking a writ of certiorari, sought review in accordance with the powers contained in section 13 (ii) of the Rent and Charged Land (Restriction) Enactment 1940 (since repealed and replaced by the Control of Rent Ordinance, 1948). The applicant in these proceedings has not so acted.

Mr. Ramani, who argued the applicant's case with great ability, submitted that section 13 (ii) of the Rent

and Charged Land (Restriction) Enactment 1940 was intended only to allow the Board to review at its own instance. I agree that the section is silent as to the right of a *party* to apply for review, so is the corresponding section in the replacing Ordinance (6 of 1948), but it was done in *Yeo Poh Neo* (cited *supra*), and I find no reason to question such procedure. The applicant in *Yeo Poh Neo* (cited *supra*) evidently regarded it right and proper to exhaust the sanctions contained in the Enactment before praying the Supreme Court to intervene, and this brings into consideration the submission by Mr. Rintoul for the respondent that this Court should not interfere where the applicant has failed to avail himself of another remedy open to him.

With this I agree. The applicant, within reasonable time (there was no stipulated period), should have supplicated review. If still dissatisfied he could then have moved this Court as he does now. The decision of the Board was given on the 27th of September, *1946;* the applicant took no step until after the respondent had instituted ejectment proceedings in May 1947, indeed it was not until the 12th of July that this motion was filed. Mr. Rintoul submitted that these proceedings are an attempt to evade the statutory prohibition of appeal (section 13 of 14/40). I will not go so far, and I must distinguish carefully between these proceedings and an attempt to appeal against the decision of the Board. A party is at liberty to seek any remedy open to him by law.

In this instance I find that application to the Board within reasonable time was a condition precedent to the favourable exercise of the discretion of this Court in certiorari. A primary object of the Rent and Charged Land (Restriction) Enactment 1940 was to determine and conclude differences with expediency.

The applicant was fully aware of his position on the 27th of September, 1946. A delay of nine months is unwarrantable (Annual Practice, 1946-7, page 1363). This Court has a discretion to exercise, and on this ground also the application is refused, *R. v. Staffordshire Justices*[4]; *Chitaley and Rao* Code of Civil Procedure Vol. I, page 1123.

Therefore, because the applicant did not first seek his remedy of review, and further because of laches I decline to interfere with the decision of the Board.

But assuming the applicant had taken such preliminary steps in sufficient time, I am still against him.

The principal argument of Mr. Ramani concerns the status of the respondent before the Rent Assessment Board. Quite definitely an object of the enactment is to facilitate and accelerate the determination of disputes between landlord and tenant. Mr. Ramani's argument is that the respondent did not appear before the Board as landlord, therefore he should not have been heard; alternatively, having heard him and thus becoming then acquainted with the respondent's status, the Board improperly assumed and exercised jurisdiction.

The application by the respondent is Ex. C in these proceedings. This document describes the status of neither party. It naively alludes to them, as it does in the later documents Exhibits A and B, as "Upstairs" and "Downstairs"!

In Ex. B the notice to the applicant (the respondent before the Board) describes the respondent (the applicant before the Board) as "executor of the landlord's estate"; and at the opening of the proceedings before the Board this was repeated; learned Counsel for the respondent submitted that the whole argument proceeded on that basis. No preliminary objection was taken; each side enjoyed legal representation.

Perusing the record there can be no doubt whatever that the Board fully realised and appreciated the situations of the parties. The applicant could not — and did not — dispute his position as tenant. To whom, if not to the respondent? To whom was rent paid? Had not the position of landlord and tenant been created between the respondent and the applicant? Learned Counsel for the applicant emphasised his contention that the respondent was *not* the landlord, but no other was mooted.

The party with whom the applicant made the agreement C.W.1. had died. By his will (copy attached to the motion) he left all his property to his immediate family. Probate was granted to the respondent. He desires to regain possession of the ground floor in order to re-establish the family business for the support of the family. There is no other interested party, and the Board decided in favour of the respondent.

I cannot find that the applicant raised before the Board the points put before me. Before the Board the argument was not that the respondent was other than the landlord, but that because the will required the estate to be distributed, therefore there was no power to resuscitate the family business, which learned Counsel designated as a new business.

The definition of "landlord" in the Rent and Charged Land (Restriction) Enactment 1940 is :—

> 'Landlord' includes in relation to any premises any person other than the tenant or any one claiming through him who is or would but for this Enactment be entitled to possession of the premises.

I cannot see that if the respondent had more strictly described himself in precise legal terminology then the Board would have decided other than it did. To the Board the parties were "Upstairs" and "Downstairs"; the applicant here was the tenant ("downstairs"), and the respondent here was recognised by the applicant and the Board as the landlord ("upstairs"). In fact he was executor of his father's estate, but for all practical purposes he represented and was one of the family desiring to evict the applicant from the ground floor so as to re-start the family business. Can it be said that the Board abused its jurisdiction or acted in excess thereof? However he described himself in legal parlance it could only have been the respondent who would appear before the Board in person and seek the order eventually granted. I agree, and perhaps no one would agree more than the learned Counsel for the respondent who also represented the respondent before the Board, that strict adherence to juridical nomenclature would have removed much ground from the able argument of Mr. Ramani, but I cannot see such error or mistake as to invalidate the Board proceedings. It seems to me to come to this; if the Board had had before it the respondent under a title or designation or appendix sufficient to indicate his precise position in law, then the Board would still have adjudicated exactly as it did. There was no misunderstanding or misapprehension of the respondent's position.

The argument before the Board was mainly directed to the contention that the respondent had no power under the will to carry on, but only to realise and distribute. Before me the principal submission is whether or not the *landlord* was before the Board. In my view the Board could well hold the respondent within the definition of "landlord" set out in section 3 of the Rent and Charged Land (Restriction) Enactment 1940; and if enquiries had been made for the executor, the head of the family, the representative of the family, the owner of the property or his agent, the same respondent would have appeared.

Learned Counsel for the respondent said the Board had been termed an amateur tribunal. In the sense that it may have contained no lawyers, such a term may be accepted, and Mr. Rintoul went on to observe that the Board was not bound by strict rules and procedure. In support of this the case of *Ramasamy Chettiar v. Teung Tze Meng and another*[5] was cited. I think a broad view must be granted to the activities of the Board. So long as they conduct their proceedings in the endeavour to determine differences apparently properly before them the decision of the Board should not be disturbed. If the Board desired directions on any point of law then section 12 of the Rent and Charged Land (Restriction) Enactment 1940 afforded the avenue. If the status of the respondent had been specifically raised before the Board, such direction might have been sought, but the point was not put, and the Board never doubted its jurisdiction.

As Mr. Ramani emphasised, to succeed the *onus* was upon him to show that the order of the Board was made without jurisdiction or on principles opposite to natural justice. In the course of his argument he cited *Wade* and *Phillips* on Constitutional Law, 3rd edition, page 281; unfortunately no copy was made available to me, but I could not fail to be in full agreement with the principles elaborated. In this matter the Board heard the tenant (now the applicant) and the respondent who in whatever guise had no substitute. The Board found for the respondent on no principles opposite to natural justice which are apparent to me. Nor do I find any excess of jurisdiction. I have given the closest attention to *R. v. Electricity Commissioners*[6], *R. v. Commissioners of Income Tax for the City of London*[7] and *R. v. Grant and others*[8], all cited by learned Counsel for the applicant. In the first case cited a writ of certiorari was issued to restrain the Electricity Commissioners from proceeding with a scheme held to be *ultra vires;* how very different from the activities of this Board endeavouring to settle tenancy differences. The Electricity Commissioners wished to undertake a scheme outside its powers; the respondent here simply wanted on behalf of his widowed mother and the children the ground floor whereby they could earn a livelihood in business — a former family business. Even if the respondent had clothed himself in another guise the Board would have proceeded just as it did, and I see no reason to suspect it would have decided in any other manner than recorded.

In the next case cited (*R. v. Commissioners of Income Tax*) the judgment of Lord Alverstone is illuminating. This is a case in which it was suggested that the Commissioners had entertained a question other than the one actually before them, and indeed there seems to have been some doubt as to this. But Lord Alverstone went on to say :—

> If I was satisfied that the Commissioners had entertained a different question under this section I should not have hesitated to make the rule absolute. In my opinion it would be directly in accordance with the principles which we considered the other day, as to when certiorari should go, and I think the fact that the Commissioners are final judges, as I will explain in a moment, on this question, which I think does arise under sect. 23, would have been no answer to an application for certiorari if it had been established on affidavits that they had been considering an entirely wrong question. But, after the affidavits have been read, it does seem to me that at any rate it is by no means clear that they were considering any other question, and that the only criticism that can be addressed to the decision they have given is that they have possibly, from the Crown's point of view, improperly answered that question, either in law or in fact. Now, assuming the question was one for their jurisdiction, I have never had any doubt upon the point, and I do not think it is even necessary to do more than state the proposition, and it is not necessary to refer to the authorities from which Mr. Danckwerts read passages, because I think it has been long recognised that where a tribunal of this kind acts within their jurisdiction on a matter properly before them, although they have gone wrong in law in the way they have applied the rules of law to their judgment, or have gone wrong in fact, it is not for us to interfere. I abstain from giving any opinion as to what the result of such a calculation would be beyond simply saying this, that I am not satisfied they went wrong in any way in dealing with the matter. I say that because possibly we may not all of us have come to a distinct conclusion as regards the right calculation to be made in such a case, but I only desire to say for myself that I am not at all satisfied they went wrong on the merits; but be that as it may, it is not for us to interfere.

No phraseology of mine could so aptly cover the conduct of the Board in the proceedings before this Court. It had jurisdiction between landlord and tenant; so far as it was aware, and in so far as it was practicable, for there was no other person to appear as landlord, the Board adjudicated. I am not satisfied they went wrong, even if it did go wrong in law or fact it is not (following Lord Alverstone) for this Court to interfere (16 English and Empire Digest, page 417, para. 2769).

Nor do I find the third case cited (*R. v. Grant*) affects my view. This is an old case in which it was held that the Justices of the West Riding of Yorkshire had power to hear a complaint against the conduct of certain arbitration proceedings between friendly society and one of it's members. The complainant alleged that the award of the arbitrators was null and void, he alleged a wrongful refusal to hear evidence, and therefore there had in fact been no award. The Justices were held to have acted within jurisdiction to hear the complaint and to make an order to the arbitrators. I have never questioned the superintending power of this Court over any proceedings of the Rent Assessment Board, nor is there any dispute that as between landlord and tenant the Board has jurisdiction; Mr. Ramani's argument is that the Board directed possession to be given to the respondent in a capacity other than his actual status in law, that is to say as the son of the deceased Kwan Lan Su whereas he appeared before the Board as executor, and Mr. Ramani even queried this, for the property at that time seems to have remained registered in the name of the deceased and the application was not made *qua* executor.

Indeed "an executor is not only the legal representative of his testator, but capable of instituting a suit". This was cited by learned Counsel for the respondent from *Meyappa Chetty v. Supramaniam Chetty*[9]. Surely, following such authority, the respondent could seek possession of the premises in question before the Board? He had proved, which takes him further than the case above cited.

It all reverts to the fundamental as to whether the Board honestly and properly adjudicated on a matter between two persons who came before it as landlord and tenant respectively. The former could have, and perhaps should have, described himself in addition to that which he did, but the person would have remained the same. Perhaps another test is, assuming the proceedings were in favour of the applicant to whom would he continue to pay the rent? Is there any real contention that it would be tendered to anyone other than the respondent, no matter how designated? Mr. Rintoul citing *P. V. Athimoolam Chettiar v. S. A. Athamsah & Co.*[10] argued that the word "landlord" has a wide meaning, and I agree that before the Rent Assessment Board, provided the tenant (here the applicant) was shown to have treated and regarded the respondent as his landlord, I do not think it was incumbent on the Board to decline jurisdiction because or until the respondent amended his description to cover a position at law which would not in substance have affected the relationship between the parties.

Learned Counsel for the applicant said the Board should have asked itself whether the landlord claimed the property and whether the estate wanted it. He said there was abundant evidence that the estate did not want it, and he suggested that the respondent was simply trying to obtain it in an individual capacity. But the whole tenor of the proceedings before the Board were that possession was sought to re-start the family business whose sign is displayed there to this day (I viewed the premises with the assent of the parties). The respondent said "My father's family are dependent on this business". Can it be seriously

contended that the order of the Board was an abuse of its jurisdiction improperly exercised?

Alternative accommodation was mentioned, and the applicant spoke to the respondent of 32 or 45 Birch Road, the latter premises belonging to the applicant's partner. No doubt the stand and goodwill of a goldsmith's business in the main street of Seremban is a great asset. The applicant would have been well advised to have ensured a properly drawn tenancy or lease agreement. The document C.W.1. could be construed in several ways. Mr. Rintoul submitted that a monthly tenancy is apparent, but that is not beyond argument; clearly no legal mind drafted it, and if persons are so unwise as to record their agreements and intentions in such unskilled manner, they must bear the consequences in the way of considerable litigation expenses.

But to return to the motion this Court is unable also for these further grounds to accede to the application.

Before concluding this judgment I wish to mention the very great benefit of having before me in full the addresses of learned Counsel. Their able arguments were recorded in short-hand by my Secretary, Mr. Lee Moh Wah.

The Order is refused, and the motion is dismissed with costs in favour of the respondent.

Application Dismissed.

KUNG SWEE HENG & ANOTHER v. PARITAM KAUR.

[Orig. Civil Juris. (Hill, J.) April 10, 1948]
[Kedah — Civil Suit No. 20 of 1948]

Frustration of Contract — Impossibility of performance — Claim for return of money paid in advance.

This was a claim for the specific performance of an agreement dated the 5th of December 1941 or alternatively the refund of the deposit of $500.00. On the 5th of December 1941 the plaintiffs paid the sum of $500.00 to the defendant as deposit for the purchase of premises at No. 7 Jalan Mahdali and was given a receipt for the money. The war came and the transaction between the parties could not be completed, as the plaintiff was in fear of his life at the hands of the Japanese and as for a considerable period land transfers were prohibited by the Japanese.

Held, (1) that in the circumstances it was impossible for the plaintiffs to perform their part of the contract within a reasonable time and therefore the contract was frustrated; and (2) that, applying the principle laid down in the **Fibrosa Case**, the plaintiffs were entitled to a refund of the deposit of $500.00.

Case referred to:—

(1) *The Fibrosa Case* (1943) A.C. 32.

CIVIL SUIT.

Mrs. B. H. Oon for the Plaintiffs.

R. D. Hume for the Defendant.

Hill, J. : — There is no dispute as to how the transaction between the parties to this case arose. The facts briefly are as follows :—

> Early in December, 1941, the plaintiffs approached Mr. Joo Peng Lim, an Interpreter of this Court, and asked him to ascertain from the defendant, whose husband was a Court Interpreter at Kulim, if she was willing to sell the premises at No. 7 Jalan Mahdali. A reply in the affirmative was given and the defendant fixed the purchase price of $7,800.00 and requested an advance or deposit of $500.00. The plaintiffs accepted this figure and on 5/12/41 handed Mr. Joo Peng Lim the sum of $500.00 and on that day he paid this amount to the defendant and received from her exhibit P-1. Beyond this stage the business between the parties has not progressed.

One of the questions this Court has to decide is whether the Exhibit P-1, which acknowledges the receipt of $500.00, is an agreement and if it is, whether time was the essence of it. This was put forward strongly by Mr. Hume and it seems convenient to consider the point at this stage, though in all the circumstances of this case I doubt if it has any real bearing. P-1 purports to be something more than a mere receipt and by it a date, 21.12.41, is fixed for the payment of the balance of the purchase money. At the time P-1 was written it is not disputed that plaintiffs were willing and able to complete the purchase. The fixing of any date was a matter, it seems clear from Mr. Joo Peng Lim's evidence, of mere convenience to the defendant and her husband the date fixed being one on which they could conveniently travel to Alor Star from Kulim. At the time the purchase price was agreed on and when the plaintiffs parted with the $500.00 deposit, no question of time was stipulated or even raised. The plaintiffs were not signatories to the document P-1 which was written after they had parted with their $500.00 and I am therefore of the opinion that P-1 is not a contract, that it should be regarded as a mere receipt and that time was therefore not of the essence of the contract between the parties.

On 8.12.41 the war came to Alor Star and the male plaintiff, who has stated that he was engaged in anti-Japanese activities, had to flee in fear of his life at the hands of the invaders. Only once during the Japanese occupation did he return to Alor Star, and then secretly. In addition to these "personal" reasons of the male plaintiff, the Japanese authorities for some